No. 87-107

In the Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON, PETITIONER

v.

MCLEAN CREDIT UNION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a plaintiff may state a cause of action under 42 U.S.C. 1981 based on alleged racial harassment by her employer.

2. Whether, in an action under 42 U.S.C. 1981 for alleged racial discrimination in promotion, the plaintiff must demonstrate that she was more qualified than the person who was actually selected for the position to which the plaintiff sought promotion.

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INTEREST OF THE UNITED STATES

The United States has responsibility for enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The decision of the court below turned in large part on its understanding of Title VII's coverage and of the evidentiary standards and presumptions used in Title VII cases for evaluating whether intentional discrimination has been established; thus, this Court's decision has potential importance for the future interpretation of Title VII and for the responsibilities of the United States in enforcing that statute. Further, the availability of remedies

under 42 U.S.C. 1981 for acts of racial discrimination in employment affects the degree of compliance with, and the allocation of government resources in enforcing, the proscriptions of Title VII. For similar reasons, the United States has participated as amicus curiae in other cases involving 42 U.S.C. 1981. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, No. 85-1626 (June 19, 1987); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

STATEMENT

1. Petitioner, Brenda Patterson, is a black female (Pet. App. 3a). She was an employee of respondent, McLean Credit Union, from May 5, 1972 to July 19, 1982 (*ibid.*). Following her July 19, 1982 layoff, petitioner instituted this suit, alleging that respondent had violated 42 U.S.C. 1981 by harassing her, failing to promote her, and discharging her, because of her race (Pet. App. 2a). Petitioner also asserted a pendent state law claim of intentional infliction of emotional distress (*ibid.*). Apparently because of statute of limitations problems, petitioner did not assert any claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Pet. App. 2a n.*).

2. At trial, petitioner testified that, at the time she was hired, respondent's president, Robert Stevenson, told her that the white women in the office would not like her because she was black (Pet. App. 3a-4a). Petitioner further testified that, during her ten years of employment with respondent, she was subjected to what she considered to be racially motivated harassment by Stevenson (*id.* at 4a). Specifically, she alleged that Stevenson assigned her an excessive number of tasks (and thus placed great pressure on her), made her perform tasks (such as sweeping and dusting) that white employees did not perform, once told her that black employees are known to

work more slowly than white employees, periodically stared at her for several minutes at a time, and criticized her in staff meetings while not similarly criticizing her fellow white employees (*id.* at 4a-5a). Finally, petitioner testified that, although she repeatedly expressed interest in advancing from her file clerk position to an accounting or secretarial position, respondent did not post job openings or otherwise inform her of vacancies in these positions; that whites with less education than she had were hired when secretarial or accounting positions opened; that a white employee named Susan Williamson was trained for and promoted to the position of "Account Intermediate" even though she had less seniority than petitioner; and that, when petitioner was laid off, respondent retained white employees with less experience than petitioner (*id.* at 5a; I Tr. 12, 21-23, 49, 91-96; II Tr. 58-61, 100-101). Respondent denied these allegations and, among other things, offered evidence that Williamson's qualifications—in terms of job evaluations and educational background—were superior to petitioner's qualifications (Pet. App. 19a; I Tr. 11-12, 21; II Tr. 52, 58-61, 105; III Tr. 48-51; IV Tr. 31-35, 110-115).

3. At the close of the evidence, the district court granted respondent's motion for directed verdict with respect to the state tort and racial harassment claims, but denied the motion insofar as it sought dismissal of petitioner's other discrimination claims (Pet. App. 2a-3a). On the state tort claim, the court ruled that Stevenson's alleged treatment of petitioner did not rise to the level of "outrageousness" and "extremity" required for recovery under the law of intentional infliction of emotional distress in the State of North Carolina (*id.* at 6a, 11a-12a). On the racial harassment claim, the court held that, while evidence of harassment is admissible as proof of discriminatory intent on issues relating to promotion, layoff, and discharge, such alleged harassment does not state a distinct claim under 42 U.S.C. 1981 (Pet. App. 6a,

24a). Finally, on the other discrimination claims, the court ruled that petitioner had adduced sufficient evidence to justify submitting the case to the jury (*id.* at 6a, 24a-25a). Over objection by petitioner, however, the court instructed the jury that, on the promotion discrimination claim, petitioner was required to prove that she was more qualified than Susan Williamson for promotion to the intermediate accounting clerk position and, in addition, that she was denied the promotion because of her race (*id.* at 18a; V Tr. 12-14, 29-30).[1] The jury returned a verdict in favor of respondent (Pet. App. 6a).

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[1] The instruction stated (V Tr. 12-14 that:

> • • • You will first consider Issue 1(a). Part (a) of Issue 1 relates to plaintiff's contention that the defendant denied plaintiff a promotion because of her race. In order to carry her burden on Issue 1(a), the plaintiff must establish (1) that a promotion was in fact given to Susan Howard Williamson; (2) that the plaintiff had expressed an interest in the promotion, [and] plaintiff may satisfy this requirement by showing that she had expressed a general interest in advancing as opportunities arose within the credit union; (3) that plaintiff was better qualified for the position received by Susan Howard Williamson than was Susan Howard Williamson; and (4) that plaintiff was denied the promotion because of her race.
>
> With regard to the fourth requirement, plaintiff offered evidence tending to show that she had not been trained for the job of accountant intermediate because of her race and was thus denied the promotion because of her race. Plaintiff offered evidence tending to show that defendant's stated reasons for not promoting plaintiff were not its real reasons but a pretext for race discrimination. On the other hand, defendant offered evidence tending to show that it did not deny plaintiff the promotion because of her race. • • •
>
> For the plaintiff, Mrs. Patterson, to prevail upon this issue, it is necessary that she satisfy you by a preponderance of the evidence that she was more qualified to receive the promotion to the accountant intermediate position than was Susan Howard Williamson and that McLean's intentional discrimination against her because of her race was the real reason she did not receive the promotion.

4. The court of appeals affirmed (Pet. App. 1a-20a). It agreed that petitioner's "evidence was not sufficient to support submission [to the jury] of her pendent state claim of intentional infliction of mental and emotional distress" (*id.* at 11a). It further agreed that petitioner's "claim for racial harassment is not cognizable under [42 U.S.C.] 1981" (*id.* at 7a). It reasoned that "[t]he broader language of Title VII, which makes unlawful 'discriminat[ion] against any individual with respect to his compensation, *terms, conditions, or privileges* of employment because of such individual's race,' • • • stands in critical contrast to [Section] 1981's more narrow prohibition of discrimination in the making and enforcing of contracts" (*id.* at 7a-8a (emphasis in original, citation omitted)). The court thus concluded that, while "[i]nstances of racial harassment • • • may implicate the terms and conditions of employment under Title VII, • • • and of course may be probative of the discriminatory intent required to be shown in a [Section] 1981 action, • • • standing alone, racial harassment does not abridge the 'right to make' and 'enforce' contracts—including personal service contracts—conferred by [Section] 1981" (*id.* at 9a (citation omitted)).

The court also rejected petitioner's argument that "the trial court erroneously instructed the jury that[,] in order for her to prevail on her promotion discrimination claim, she had to show that she was more qualified than Susan Williamson" (Pet. App. 18a). It stated that, "once [the] employer • • • advanced superior qualification as a legitimate nondiscriminatory reason for favoring another employee over the claimant, the burden of persuasion [was] upon the claimant to satisfy the trier of fact that the employer's proffered reason [was] pretextual" (*id.* at 19a), and that, to do so, "the claimant [had] to prove her superior qualifications • • •" (*ibid.*). This requirement, the court said, "reflects the principle established in Title VII cases that an employer may, without illegally

discriminating, choose among equally qualified employees notwithstanding [that] some may be members of a protected minority" (*id.* at 20a).

SUMMARY OF ARGUMENT

I. Title 42 U.S.C. Section 1981 provides, in pertinent part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens * * *." It is now well-established that Section 1981 prohibits racial discrimination in the making and enforcement of private contracts, including contracts of employment. At the same time, however, it also seems clear that Section 1981 does not itself create or define, either in whole or in part, the covenants of the private contracts to which its prohibition is applicable. Accordingly, the Court has found violations of Section 1981 only where there is intentional racial discrimination in decisions relating to, or laws concerning, the execution, definition, or performance of contractual opportunities and obligations existing apart from Section 1981 itself. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, No. 85-1626 (June 19, 1987), slip op. 6-12; *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 276, 285-286 (1976).

A Section 1981 violation may, of course, rest on discrimination in connection with a contractual covenant agreed to or offered by the parties. But contractual covenants may also be implied in law. It is through such a covenant, either agreed to or implied in law, that the predicate for an action under 42 U.S.C. 1981 concerning alleged racial harassment in employment may and must be supplied. In this regard, we note that the common law has traditionally read into all contracts, by implication, an obligation of good faith and fair dealing that generally prohibits the parties to a contract from wrongfully preventing or substantially hindering each other from performing their respective contractual obligations. Employment contracts have not been excepted from this implied covenant of good faith and fair dealing. Thus, where state law implies into a contract some such covenant of good faith and fair dealing, as it generally will, the parties to an employment contract are obliged to refrain from actions aimed at wrongfully hindering or substantially preventing performance by the other. Where these actions are racially motivated and are of sufficient severity and pervasiveness to establish that the harassed employee has been deprived of her right to enjoy the covenant of good faith and fair dealing that is enjoyed by employees of other races, a violation of 42 U.S.C. 1981 should be found.

We doubt, however, that the implied covenant of good faith and fair dealing embodies as extensive a prohibition of racial harassment as does Title VII. Accordingly, Section 1981 likely will cover only a subset of the racial harassment cases covered by Title VII. And we further doubt that Congress in enacting Title VII intended that Title VII's prohibition against racial harassment would itself be treated as an implied term of every employment contract, the violation of which in turn would give rise to a claim under 42 U.S.C. 1981. Such a conclusion would contradict Congress's intention that enforcement of Title VII's prohibitions occur exclusively through Title VII's carefully calibrated procedural and remedial mechanisms.

Our preliminary research indicates that the State of North Carolina, which is the relevant jurisdiction in this case, follows the general pattern of the common law in that, as a matter of state law, it implies in every contract a species of the covenant of good faith and fair dealing. Accordingly, unless petitioner's evidence of harassment was such that no reasonable person could have found a breach of the covenant of good faith and fair dealing implied by North Carolina law, the harassment

claim under Section 1981 should have been submitted to the jury. The jury should have had the opportunity to find that the preponderance of the evidence showed that respondent, by its harassing actions and on account of petitioner's race, wrongfully deprived petitioner of the benefit of the covenant of good faith and fair dealing implied in North Carolina law.

II. The court below also erred in upholding the district court's instruction that petitioner's discriminatory denial of promotion claim had to fail unless the jury found that petitioner was more qualified for the job than was Susan Williamson and, in addition, that petitioner was denied the promotion because of her race. Only the second element of the court's instruction—the presence of a discriminatory purpose behind the employment decision—is in fact required. A plaintiff may show this discriminatory purpose in many ways. She may rely on evidence that she was more qualified than the candidate who was actually selected for the position. Or she may prove discriminatory intent by showing that she had the minimum qualifications necessary for the job and, in addition, that the employer's proffered justification for denying her the job was pretext. In all events, the ultimate question remains the same—whether or not the employer denied the plaintiff the petition sought because of her race. Once the fact-finder makes that determination, there is no reason for it to ask the additional question whether the plaintiff's qualifications were superior to those of the person who actually received the promotion; the ultimate question of discrimination has already been resolved.

ARGUMENT

I. A PLAINTIFF MAY STATE A CAUSE OF ACTION UNDER 42 U.S.C. 1981 BASED ON ALLEGED RACIAL HARASSMENT BY HER EMPLOYER WHERE STATE LAW IMPLIES INTO THE EMPLOYMENT CONTRACT A COVENANT OF GOOD FAITH AND FAIR DEALING

The court below erred in holding that racial harassment may never state a distinct claim under 42 U.S.C. 1981. It is true that Section 1981 proscribes only race-based denials of the opportunity to make or perform contracts. It is also true that Title VII is not, like Section 1981, strictly confined by its terms to contractual relationships; Title VII makes racial harassment in the employment context a wrong independent of the terms of the employment contract. The court below was mistaken, however, in concluding from these premises that racial harassment may never state a distinct claim under 42 U.S.C. 1981. On the contrary, where an employment contract includes, either explicitly or by implication, a covenant of good faith and fair dealing, as is the case in most if not all jurisdictions, severe and pervasive racial harassment may well create the necessary predicate for a Section 1981 claim; it may deprive its victim of the right to enjoy the benefits of a contractual covenant that is enjoyed by employees of other races. Our preliminary research indicates that the common law of the State of North Carolina contains an implied covenant of this sort. Accordingly, we believe that the court below erred in holding that petitioner's allegation of racial harassment could not state a distinct claim under 42 U.S.C. 1981.

A. We begin by defining with some specificity our understanding of the contours of 42 U.S.C. 1981's prohibition, as interpreted by this Court. The statute provides, in pertinent part, that "[a]ll persons within the

jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts • • • as is enjoyed by white citizens • • •." While there has been considerable controversy as to whether this statutory commandment was intended to do anything more than prohibit state laws that would disable persons on the basis of their race from making or enforcing contracts (see *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 386-388 (1982); *Runyon* v. *McCrary*, 427 U.S. 160, 192-214 (1976) (White, J., dissenting); *cf. Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 449-480 (1968) (Harlan, J., dissenting)), "[i]t is now well established that • • • 42 U.S.C. 1981[] prohibits racial discrimination in the making and enforcement of private contracts" (*Runyon* v. *McCrary*, 427 U.S. at 168). See also *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. at 382-391; *id.* at 405-406 (Stevens, J., concurring); *Runyon* v. *McCrary*, 427 U.S. at 189-192 (Stevens, J., concurring).

Employment contracts are plainly among the "private contracts" to which Section 1981's prohibition has been held applicable. *See Goodman* v. *Lukens Steel Co.*, No. 85-1626 (June 19, 1987), slip op. 6-12; *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285 (1976); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975); but *cf. Runyon* v. *McCrary*, 427 U.S. at 187-189 (Powell, J., concurring) (suggesting that some contracts are so personal as to have a discernible rule of exclusivity which is inoffensive to Section 1981). Thus, an employer violates Section 1981 when it refuses to hire black persons at all, for in such cases it has denied black persons "the same right • • • to make • • • contracts • • • as is enjoyed by white citizens" (42 U.S.C. 1981). Similarly, an employer violates Section 1981 when it fires black persons or refuses to consider them for promotions because of their race, since such actions effect the same

discriminatory denial of contractual opportunities as refusals to hire in the first instance. And, finally, an employer violates Section 1981 when it intentionally assumes different contractual obligations with respect to black persons than to white persons, or intentionally fails in a discriminatory manner to comply with its contractual obligations, since in each instance the employer is denying black persons the contractual opportunities offered to white persons. See *Goodman* v. *Lukens Steel Co.*, slip op. 6-12; *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. at 285-286.

Section 1981 does not, however, itself purport to create any of the private contractual obligations to which its prohibition is applicable. Accord, *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. at 396 ("The language of the statute does not speak in terms of duties."). Contractual covenants are created and for the most part defined by the parties. See *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 840-842 (1982); *Evans* v. *Abney*, 396 U.S. 435, 455-447 (1970). Section 1981 creates only the simple, albeit significant, guarantee that the opportunity to enter into and fully perform contracts shall not be denied, impeded, or frustrated on the basis of race. See *Goodman* v. *Lukens Steel Co.*, slip op. 4 ("competence and capacity to contract shall not depend upon race"). Accordingly, in cases initiated under Section 1981, the Court has found violations only where there is racial discrimination in decisions relating to, or laws concerning, the execution, definition, or performance of contractual covenants existing apart from Section 1981 itself.

For example, in *Goodman* v. *Lukens Steel Co.*, *supra*, before deciding whether the union involved there had violated Section 1981 through its actions, the Court reviewed the findings of the trial court concerning the obligations assumed by the employer and the union in their collective bargaining agreement. The Court noted

that the trial court had found that the non-discrimination clause of the collective bargaining agreement prohibited, and thus made grievable, racial harassment and racially-motivated terminations of probationary employees. Slip op. 10-11. Only after accepting these findings did the Court hold that the union had violated 42 U.S.C. 1981 (and Title VII) by refusing to file grievances on behalf of black employees who claimed that they were the victims of racial harassment or racially-motivated terminations. *Goodman* v. *Lukens Steel Co.*, slip op. 7-8. Refusing to file such grievances, the Court held, intentionally deprived these black employees of the contractual opportunities provided to all employees by the collective bargaining agreement. *Id.* at 11-12.

Similarly, in *McDonald* v. *Santa Fe Trail Transp. Co.*, *supra*, before deciding whether the white employees involved there could state a claim under Section 1981, the Court reviewed the allegations of the complaint concerning the terms on which the employer was willing to offer employment. The Court accepted the allegations of the two white employee petitioners that they and another black employee had been charged with misappropriating property from their employer and that only they, and not the black employee, had been discharged. 427 U.S. at 276. On these allegations, the Court held that the white employees could state a claim under 42 U.S.C. 1981; the white employees had been denied the specific contractual opportunity made available to the black employee—continued employment notwithstanding charges of misappropriation of the employer's property. 427 U.S. at 285-286, 295-296.

The decisions in *Lukens Steel Co.* and *Santa Fe Trail Transp. Co.* indicate that a Section 1981 violation arises only from purposeful racial discrimination in connection with contractual arrangements existing apart from Section 1981—*e.g.*, arrangements to hire, fire, promote, and pay wages for performance of designated duties. Thus, the question raised by this case—whether a plaintiff may

state a cause of action under 42 U.S.C. 1981 based on alleged racial harassment by her employer—turns on (a) whether, and to the extent that, an employer has agreed in an employment contract, either explicitly or by implication (in law or fact), to refrain from such actions, and (b) whether the alleged contractual violation occurred and was motivated by race.[3] Whenever such a contractual breach exists, proof that it was motivated by race should suffice to state a cause of action under 42 U.S.C. 1981.

B. The predicate contractual obligation necessary for a Section 1981 racial harassment claim may arise from an express term of a contract, as was apparently the case in *Lukens Steel Co.* A relevant covenant could also, however, be implied in law. We are not aware of any covenant implied in law that proscribes harassment as such, for harassment is analyzed more naturally as an issue of tort (and not contract) law. See Restatement (Second) of Torts §§ 46-47, 766-767 (1965).[3] But the common law of contract generally does imply in all contracts a covenant of good faith and fair dealing. See Restatement (Second) of Contracts § 205(d), at 101-102 (1981). The breach of this covenant could well be proved by evidence of harassment sufficient to frustrate, impede, or prevent performance of the contract, and, we believe, such a breach would supply the necessary contractual predicate for a Section 1981 claim, if motivated by race.[4]

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[3] The prohibition of 42 U.S.C. 1981 is, of course, not limited to employment contracts. See *Runyon* v. *McCrary*, *supra*.

[3] Petitioner recognized the tort aspect of her claim. She argued that she was the victim of intentional infliction of mental and emotional distress. See Pet. App. 11a-15a.

[4] The implied covenant of good faith and fair dealing is a basic feature of the common law of contracts. See Restatement (Second) of Contracts, *supra*, § 205; U.C.C. §§ 1-201:19, 2-103 (1981). As many commentators have noted, a coherent system of contractual obligation requires some such implied covenant; it is difficult to

More specifically, the common law has traditionally implied in all contracts a covenant that the parties to the contract will refrain from wrongfully preventing or substantially hindering each other from performing their respective contractual obligations. See Restatement (First) of Contracts §§ 295, 315 (1932); 3A A. Corbin, *Corbin on Contracts* § 770, at 557 (1960). On this theory of the implied covenant, "if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure" (5 S. Williston, *Williston on Contracts* § 677, at 224 (W. Jaeger 3d ed. 1967)). In such a situation, further performance is excused at the option of the victim of the breach; indeed, the victim may recover damages on the contract if she can show that she would have been ready, willing, and able to perform the contract but for the wrongful prevention or substantial hinderance by the other party. See Restatement (First) of Contracts, *supra*, § 315; *Corbin on Contracts* § 770, at 557.

Employment contracts have not been excepted from this implied covenant of good faith and fair dealing. As Williston explains, even in contracts for a specific term, "[i]nsolent or disrespectful language or conduct on the part of a servant will justify dismissal" (9 *Williston on Contracts*, *supra*, § 1014A, at 59). "Similarly, the employer is under a duty to refrain from language or conduct of so severe or offensive a nature • • as to justify the employee in leaving" (*id.* at 60). As in any contract,

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imagine a system of contract law in which the terms of contractual agreements would not be evaluated against a background assumption that the parties have agreed to act in good faith in their dealings with each other. See, *e.g.*, Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 666 (1963); Eisenberg, *Good Faith Under the Uniform Commercial Code—A New Look at an Old Problem*, 54 Marq. L. Rev. 1 (1971).

the employer and employee conventionally are under an implied obligation not to wrongfully prevent or substantially hinder each other's performance.[8]

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[8] This conventional obligation of good faith and fair dealing must be distinguished from the doctrine that some states have recently used to limit the freedom of employers to discharge employees who are employed at-will—*i.e.*, without a specific term. See, *e.g.*, *Pugh* v. *See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *Fortune* v. *National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Monge* v. *Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974). The conventional common law obligation of good faith and fair dealing provides only that, while a contract continues, each party to the contract must refrain from activity that would impair or unduly burden the performance of the contract by the other party; it places no durational term on the contract or restrictions on the reasons why a contract may be discontinued. Restatement (Second) of Contracts, *supra*, § 205, at 99-100. The conventional common law obligation of good faith and fair dealing thus has co-existed quite comfortably with another conventional rule—that, where a contract does not contain a specific durational term, it may be terminated at-will by either party for any reason. See *Pugh* v. *See's Candies, Inc.*, 116 Cal. App. 3d at 319-321, 171 Cal. Rptr. at 920-922; Note, *Defining Public Policy Torts in At-Will Dismissal*, 34 Stan. L. Rev. 153, 154-155, 158-159 (1981). Those states that have modified or abandoned the at-will rule have simply *extended* the covenant of good faith and fair dealing beyond its traditional origins and function so as to support an implied term of more permanent employment. See, *e.g.*, *Monge* v. *Beebe Rubber Co.*, 114 N.H. at 133, 316 A.2d at 551-552.

It is therefore irrelevant to this case that the State of North Carolina, where this lawsuit was initiated, adheres to the common law doctrine of employment at-will. See *Guy* v. *Traverol Laboratories, Inc.*, 812 F.2d 911, 912-915 (4th Cir. 1987) (reviewing meaning and status of at-will employment doctrine in State of North Carolina). The at-will employment doctrine would not protect an employer from liability under 42 U.S.C. 1981 if it had discharged an employee for racial reasons any more than if it had refused to contract with the employee for racially motivated reasons in the first place. See *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. at 285-286. Accordingly, the at-will doctrine cannot give an employer immunity for such racial harassment as would have provided an employee with the necessary contractual justifica-

Racial harassment may therefore be actionable under 42 U.S.C. 1981 where, as is generally the case, state law implies some such covenant of good faith and fair dealing into the contracts governed by the law of that jurisdiction.[6] In such circumstances,[7] the relevant questions

tion for quitting, even if she did not quit. Where the implied covenant of good faith and fair dealing exists at state law, an employer generally must refrain from impairing or unduly burdening an employee's performance on the contract while her employment continues, even if either party could have terminated the employment without notice and for any (non-racial) reason.

[6] The law of the various states with respect to the implied covenant of good faith and fair dealing is summarized and annotated in the appendices to the first and second Restatement of Contracts. Federal courts are, of course, courts of limited jurisdiction and thus ordinarily do not have the power to imply common law contract terms (as do the courts of the states); they must apply the contract law of the state relevant to the controversy in issue. *United States* v. *Standard Oil Co.*, 332 U.S. 301, 313 (1947); *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938). We note, however, that in certain contexts, such as in the collective bargaining and admiralty contexts, this Court has held that federal courts do have some limited common lawmaking powers. See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 20-21 (1963); see generally *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 95-97 (1981). In these exceptional cases involving collective bargaining agreements and admiralty contracts, it may well be, though the Court need not now decide, that a general duty of good faith and fair dealing could be implied as a matter of federal contract law. See *United States* v. *Peck*, 102 U.S. 64, 65-66 (1880); *Manners* v. *Morosco*, 252 U.S. 317, 326-327 (1920). But see *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970).

[7] That the scope of Section 1981's coverage may vary from state to state should not be surprising. Congress did not intend in Section 1981 to nationalize the law of contracts; rather, it intended only to ensure that, whatever the law is in any particular jurisdiction, the opportunity to contract is the same for persons of all races in that jurisdiction. Accordingly, it is quite natural that the analysis of Section 1981 claims turns on the law of the relevant state (or the express agreement of the parties). See generally *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. at 386-391.

become whether, as a factual matter, the actions of which the plaintiff complains—such as insulting language, excessive work assignments, demeaning work assignments, etc.—constitute a breach of the express or implied terms of the contract and, if they do, whether these actions were motivated by racial animus.[8] If such contractual terms have been breached and breached with the requisite racial purpose, a violation of Section 1981 is stated. See *Goodman* v. *Lukens Steel Co.*, slip op. 10-12; *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. at 387-391; *Runyon* v. *McCrary*, 427 U.S. at 170-171; *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. at 285-286.

C. The implied covenant of good faith and fair dealing referred to above relates only to the performance of contractual obligations and responsibilities. Thus, in its conventional form, it is not offended by every incident of discourtesy or discord among the parties. Petty annoyances, trifling irritations, and, indeed, quite volatile exchanges frequently arise in contractual contexts, especially where, as in employment contracts, the parties are in relatively long-term, continuous, and personal relationships. The common law does not usually allow these disagreements and differences to relieve parties of their respective obligations, or to subject either of the parties to damages, unless the offensive actions are sufficiently

[8] Although it is doubtful, as a practical matter, whether the duty of good faith could be eliminated altogether or whether state law would countenance any such attempt, parties are generally free to limit, alter, and specify the matter covered by a covenant implied in state law. 42 U.S.C. 1981, as interpreted by this Court, would, however, prohibit parties from agreeing by contract to modify any implied covenant specifically to allow racial discrimination against one party by the other. See generally *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. at 285-296. And 42 U.S.C. 1981 would also prohibit an employer from making an express covenant of good faith and fair dealing with its white but not its black employees. See *ibid.*

severe and pervasive. See 9 *Williston on Contracts*, *supra*, § 1014A, at 59; *Corbin on Contracts* § 770, at 557-559. The nature of the conventional common law covenant, and thus the implications for litigation under 42 U.S.C. 1981 can, we think, be usefully contrasted with the protections afforded civil rights litigants by Title VII of the Civil Rights Act of 1964.

1. The conventional covenant of good faith and fair dealing implied in law would certainly be violated by circumstances amounting to a constructive discharge under Title VII. In constructive discharge cases under Title VII, it is not enough for the plaintiff to establish that employment would have continued under conditions containing substantial elements of discrimination. See *Bourque* v. *Powell Elec. Mfg. Co.*, 617 F.2d 61, 65-66 (5th Cir. 1980); *Meyer* v. *United States Steel Corp.*, 509 F.2d 923, 929 (10th Cir.), cert. denied, 423 U.S. 825 (1975). Rather, the plaintiff-employee must establish, among other things, that her working conditions were so difficult and intolerable that a reasonable person in her shoes would have felt compelled to resign.[9] Although this is much like the analysis that a court follows in determining whether a breach of the implied covenant of good faith and fair dealing has been established (see Restatement (Second) of Contracts, *supra*, § 237, at 215-222), from a contract perspective, even if a harassed employee would be justified in quitting, she need not actually do so: She may stay on the job and treat the breach

[9] In this way, the employee establishes that it was the actions of the employer, rather than her own choice, that led to the termination of the employment. See, *e.g.*, *Williams* v. *Caterpillar Tractor Co.*, 779 F.2d 47, 49-50 (6th Cir. 1985); *Goss* v. *Exxon Office Sys. Co.*, 747 F.2d 885, 887-889 (2d Cir. 1984); *EEOC* v. *Federal Reserve Bank*, 698 F.2d 633, 672-673 (4th Cir. 1983), rev'd on other grounds sub nom. *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867 (1984); *Irving* v. *Dubuque Packing Co.*, 689 F.2d 170, 172-173 (10th Cir. 1982).

of the implied condition of good faith and fair dealing as a mere breach of a term of the contract and, if the breach is racially motivated, seek recovery under 42 U.S.C. 1981. See generally *Goodman* v. *Lukens Steel Co.*, slip op. 10-12.[10]

2. On the other hand, there is no reason to believe that the conventional covenant of good faith and fair dealing is in all respects equivalent to and co-extensive with the prohibition against racial harassment contained in Title VII. See *Meritor Savings Bank* v. *Vinson*, No. 84-1979 (June 19, 1986), slip op. 9. There are undoubtedly situations in which a working environment may be so infected with discriminatory attitudes as to constitute a violation of Title VII,[11] but which nevertheless are not so severe or pervasive as to justify the conclusion that performance has been wrongfully prevented or substantially hindered. Thus, unless a state has a particularly expansive covenant of good faith and fair dealing, Section 1981 will likely provide a remedy only for a subset of the harassment cases that, in all events, can be remedied under Title VII. Cf. *Rogers* v. *EEOC*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972) (Hispanic employee established a Title VII violation by demonstrating that her employer created an offensive working environment for employees by giving discriminatory service to its Hispanic clientele); 29 C.F.R. 1604.11(a)

[10] Of course, her failure to quit may constitute evidence that the employer's actions were not so severe and pervasive as materially to frustrate, impede, or prevent performance of the contract; and it has been held that a failure to quit defeats a constructive discharge claim under Title VII. *Young* v. *Southwestern Savings & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975); EEOC Dec. 84-1, 33 Fair. Empl. Prac. Cas. (BNA) 1887, 1892 (1983).

[11] Even under Title VII, "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment * * *." *Meritor Savings Bank* v. *Vinson*, No. 84-1979 (June 19, 1986), slip op. 9.

(emphasis added) (conduct constitutes prohibited harassment for purposes of Title VII when it "has the purpose or effect of unreasonably interfering with an individual's work performance *or* creating an intimidating, hostile, *or* offensive working environment").

3. Nor can Title VII's prohibition against racial harassment be treated as an implied term of the employment contract, the violation of which itself justifies suit under 42 U.S.C. 1981. The workplace is a theater in which all sorts of personalized interactions, grievances, and dramas are played out. The mechanism built into Title VII for conciliating and screening the disputes that arise out of these interactions, as well as the limitations placed on both the time within which complaints must be filed and the relief available with respect to them, allows Title VII to cast its net quite widely—far beyond the terms and conditions of the employment contract. Accord, *Hishon* v. *King & Spalding*, 467 U.S. 69, 75 (1984) (emphasis in original) ("An employer may provide its employees with many benefits that it is under no obligation to furnish by any express or implied contract. Such a benefit, though not a contractual *right* of employment, may qualify as a 'privileg[e]' of employment under Title VII"). In actions initiated under 42 U.S.C. 1981, by contrast, these disputes are catapulted directly into court for evaluation by a jury, which may award punitive as well as compensatory damages. See *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. at 457-461. In similar circumstances, the Court has said that Title VII's proscriptions may not form the basis for an action under another civil rights statute, because to do so would undermine Title VII's carefully calibrated procedural and remedial scheme. See *Great American Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 372-378 (1979) (holding that Title VII rights are not enforceable in actions initiated under 42 U.S.C. 1985(3)); cf. *Brown* v. *GSA*, 425 U.S. 820, 833 (1976). That same judgment is appropriate here.[12]

D. The fact that Title VII's coverage within the employment sphere is not confined to contractual obligations—explicitly assumed or implied in law—and will therefore generally be broader than the coverage of 42 U.S.C. 1981 does not, as the court below suggested (Pet. App. 7a-11a), carry the implication that a plaintiff may not state a cause of action under Section 1981 based on alleged racial harassment by *her* employer. That conclusion would follow only if the law of the relevant jurisdiction did not create an implied covenant not to prevent wrongfully or hinder unreasonably the performance of the underlying contract.[13] But our preliminary research indicates that the State of North Carolina, which is the relevant jurisdiction in this case, follows the general pattern of the common law in recognizing a species of the covenant

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[12] Indeed, since Section 1981's proscription applies to many kinds of private contracts other than those entered into by employers and employees (*Runyon* v. *McCrary*, *supra*), it would be quite odd for Section 1981's enforcement of the common law respecting contracts to take its lead from an employment statute like Title VII. The Court has rejected such arguments in the past. See *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. at 461 ("the remedies available under Title VII and under [Section] 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent").

[13] A state may not, of course, refuse to count serious racial harassment as an instance of the hinderance and undue burdening of contractual performance that would otherwise constitute a violation of an implied covenant that exists in the state's common law of contract. The principal object of 42 U.S.C. 1981 is to eradicate precisely such kinds of state laws—*i.e.*, those that disable persons on the basis of their race from making and performing contracts. See *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. at 386-387.

of good faith and fair dealing.[14] Accordingly, unless no reasonable person could have found the evidence of harassment here sufficient to support a breach of the covenant implied in North Carolina law, the matter should have been submitted to the jury with instructions that it find in favor of petitioner if the preponderance of the evidence showed that respondent, by its actions and for racial reasons, deprived petitioner of the benefit of this covenant implied in state law.[15] The failure of the court

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[14] See, *e.g.*, *Commercial Nat'l Bank* v. *Charlotte Supply Co.*, 226 N.C. 416, 431-432, 38 S.E.2d 503, 513 (1946) ("[w]here complete performance is rendered impossible by a party to a contract who has the duty of counter performance, the latter cannot take advantage of his own act and refuse performance on his part"); *Mullen* v. *Sawyer*, 277 N.C. 623, 633-634, 178 S.E.2d 425, 431 (1971) (same); see also *Barron* v. *Cain*, 216 N.C. 282, 284, 4 S.E.2d 618, 620 (1939) (plaintiff may recover damages for breach of a lifetime service contract where plaintiff's failure to perform "was due to no fault of the plaintiff but was caused by the wrongful conduct of the defendant in assaulting the plaintiff with a deadly weapon, running him off of the premises and threatening to do him great bodily harm if he returned").

[15] Petitioner proposed (C.A. App. 22) the following jury instruction relating to her claim of racial harassment under Section 1981:

> The plaintiff has also brought an action for harassment in employment against the defendant, under the same statute, 42 U.S.C. § 1981. An employer is guilty of racial discrimination in employment where it has either created or condoned a substantially discriminatory work environment. An employee has a right to work in an environment free from racial prejudice. If the plaintiff has proved by a preponderance of the evidence that she was subjected to racial harassment by her manager while employed at the defendant, or that she was subjected to a work environment not free from racial prejudice which was either created or condoned by the defendant, then it would be your duty to find for the plaintiff on this issue. If she has failed to do so, or you are unable to tell where the truth lies, it would be your duty to find for the defendant.

The question whether the petitioner, by this proposed instruction and by any other statements or objections appearing in the record, has adequately preserved a claim of racial harassment based on the discriminatory denial of contractual opportunities or breach of express or implied contractual terms enforceable under state law is best left to resolution by the courts below, along with the question of the legal sufficiency of the evidence in support of such a claim.

below to view the case from this perspective makes defective its judgment that petitioner's allegation of racial harassment could not state a distinct claim under Section 1981.

II. THE PLAINTIFF IN AN ACTION UNDER 42 U.S.C. 1981 FOR ALLEGED DISCRIMINATION IN PROMOTION DOES NOT HAVE TO DEMONSTRATE THAT SHE WAS MORE QUALIFIED THAN THE PERSON WHO WAS ACTUALLY SELECTED FOR THE POSITION TO WHICH PLAINTIFF SOUGHT PROMOTION

The court below also held that, in order to find that respondent unlawfully discriminated against petitioner in denying her the promotion to the position of intermediate accountant, the jury had to find both that petitioner was more qualified than Susan Williamson, the woman that respondent actually selected for the position and, in addition, that petitioner was denied the promotion because of her race. This holding is plainly wrong.

A. The object of proof in a case initiated under 42 U.S.C. 1981 is discriminatory purpose. See *Goodman* v. *Lukens Steel Co.*, slip op. 8 n.10; *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. at 391. As in actions under Title VII, the "'factual inquiry'" in such a case is simply "'[whether] the defendant intentionally discriminated against the plaintiff'" on the basis of race. *United States Postal Serv. Bd. of Govs.* v. *Aikens*, 460

U.S. 711, 715 (1983) (quoting *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981)). Stated differently, "[t]he central focus of the inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their race • • •.'" *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978) (quoting *Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977)).

B. This Court has made clear that evidence of discriminatory purpose may "take a variety of forms" (*Furnco Constr. Corp.* v. *Waters*, 438 U.S. at 578). The finder of fact may, for example, rely on direct evidence of intentional discrimination—that is, " 'eyewitness' testimony as to the employer's mental processes" (*United States Postal Serv. Bd. of Govs.* v. *Aikens*, 460 U.S. at 716). Alternatively, the finder of fact may rely on circumstantial evidence showing "that the employer's proffered explanation is unworthy of credence" (*ibid.* (quoting *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. at 256)). Such circumstantial evidence could include proof that the qualification upon which the employer has purported to rely has not been required equally of white and black candidates. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804 (1973). "Other evidence that may be relevant to any showing of pretext includes facts as to the [employer's] treatment of [the plaintiff] during [her] prior term of employment • • • and petitioner's general policy and practice with respect to minority employment" (*id.* at 804-805). "On the latter point, statistics as to [the employer's] employment policy and practice may be helpful to a determination of whether [its actions] • • • conformed to a general pattern of discrimination against blacks" (*id.* at 805). But whatever forms the evidence takes, the ultimate question for the fact-finder remains: whether the employee has shown by a preponderance of the evidence that the employer intentionally denied the employee the job or benefit in question because

of her race. See *United States Postal Serv. Bd. of Govs.* v. *Aikens*, 460 U.S. at 714, 715-716.

C. Viewed from this perspective, the holding of the court below—that, where the employer articulates the superior qualifications of another candidate as the basis on which it made a decision, the fact-finder must find both that the plaintiff was more qualified than the candidate who was actually selected and that the plaintiff was denied the promotion on the basis of race—is plainly wrong. The fact-finder need only find that the preponderance of the evidence establishes that but for the consideration of her race the plaintiff would not have been denied the promotion she sought. The plaintiff may demonstrate this fact by producing evidence that she was more qualified than the candidate who was actually selected. Or she may prove that she had the minimum qualifications necessary for the job and that other evidence—direct or circumstantial—establishes that the asserted justification of superior qualifications is simply a pretext for the employer's discriminatory motive. For example, the plaintiff may show that the employer denied her the promotion because of prejudice or stereotypical attitudes and beliefs on its part;[16] that the employer never truly considered the plaintiff for promotion;[17] that the employer's reasons constantly shifted;[18] that the em-

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[16] See, *e.g.*, *Blalock* v. *Metal Trades, Inc.*, 775 F.2d 703, 707-708 (6th Cir. 1985); *Bell* v. *Birmingham Linen Service*, 715 F.2d 1552, 1556-1557 (11th Cir. 1983), cert. denied, 467 U.S. 1204 (1984); *Muntin* v. *State of Cal. Parks & Recreation Dep't*, 671 F.2d 360, 362 (9th Cir. 1982).

[17] See, *e.g.*, *Joshi* v. *Florida State Univ. Health Center*, 763 F.2d 1227, 1235 (11th Cir.), cert. denied, 474 U.S. 948 (1985); *Lowery* v. *WMC-TV*, 658 F. Supp. 1240, 1250 (W.D. Tenn. 1987); *Morris* v. *Bianchini*, 43 Fair Empl. Prac. Cas. (BNA) 674, 679 (E.D. Va. 1987).

[18] See, *e.g.*, *Kilgo* v. *Bowman Transp. Inc.*, 789 F.2d 859, 875 (11th Cir. 1986); *Schmitz* v. *St. Regis Paper Co.*, 811 F.2d 131, 132-133 (2d Cir. 1987).

ployer had no standards for measuring the contested qualifications;[20] that the selecting official did not know that the white applicant's qualifications were superior at the time of selection;[20] that the selecting official could not specify why he recommended the selectee and could not recall the selectivee's performance;[21] or that there is valid statistical evidence supporting the proposition that the plaintiff was a victim of a pattern and practice of racial discrimination on the employer's part.[22] But in all events, the fact-finder need not find that the plaintiff was more qualified than the candidate who was selected; it need only find, from the preponderance of the evidence, that the plaintiff would not have been denied the position but for the consideration of her race. The court below committed reversible error in requiring the fact-finder to make both determinations in this case.[23]

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[19] See, *e.g.*, *Monroe* v. *Burlington Industries, Inc.*, 784 F.2d 568, 572 (4th Cir. 1986).

[20] See, *e.g.*, *Eastland* v. *Tennessee Valley Auth.*, 704 F.2d 613, 626 (1983), modified on other grounds, 714 F.2d 1066 (11th Cir. 1983), cert. denied, 465 U.S. 1066 (1984).

[21] See, *e.g.*, *Krodel* v. *Young*, 748 F.2d 701, 708-709 (D.C. Cir. 1984), cert. denied, 474 U.S. 817 (1985).

[22] See, *e.g.*, *Plemer* v. *Parsons-Gilbane*, 713 F.2d 1127, 1137 (5th Cir. 1983); *Sweat* v. *Miller Brewing Co.*, 708 F.2d 655, 658 (11th Cir. 1983); *Anderson* v. *City of Albuquerque*, 690 F.2d 796, 801-802 (10th Cir. 1982).

[23] We take no position concerning whether petitioner's evidence was sufficient to persuade a trier of fact that respondent's decision was unlawfully motivated. We contend only that she should not have been required to prove her superior qualifications in addition to this unlawful motive. We note, however, that there is reason to doubt that petitioner can establish the requisite unlawful motive, since she may not have possessed the qualifications necessary to be considered for promotion to the intermediate accountant position when it was available. While this fact-bound question is not deserving of review by this Court, it should be addressed by the courts below on remand, before petitioner's promotion claim is resubmitted to a jury.

D. There is simply no basis for the court of appeals' suggestion (Pet. App. 20a) that a requirement of proof of superior qualifications "reflects the principle established in Title VII cases that an employer may, without illegally discriminating, choose among equally qualified employees notwithstanding [that] some may be members of a protected minority." While Title VII cases do establish that an employer "has discretion to choose among equally qualified candidates," they also establish that the exercise of that discretion may "not [be] based upon lawful criteria" (*Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. at 249). *Cf. City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975). Once the fact-finder determines by a preponderance of the evidence that the employer denied the plaintiff the promotion because of her race, there is no basis for suggesting that the fact-finder should also have to determine that the plaintiff had superior qualifications in order not to impair the employer's discretion to choose among equally qualified candidates. In such a case, the fact-finder has already determined that the employer did not seek lawfully to exercise this discretion.

CONCLUSION

The judgment of the court of appeals should be reversed in relevant part.

Respectfully submitted.

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